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2004 NOV -9 P 4: 20

November 9, 2004

Lawrence H. Norton, Esquire  
General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

2004 NOV -9 P 4: 53

*Re: MUR 5539, Fellowship Adventure Group, LLC,  
and Harvey and Bob Weinstein*

Dear Mr. Norton:

This is the response of our clients, the Fellowship Adventure Group, LLC ("Fellowship"), and Harvey and Bob Weinstein (collectively, "respondents"), to the complaint filed in the above-captioned matter under review. For the reasons stated below, we respectfully request that the Commission determine that there is no reason to believe that any of the respondents have violated any provision of the Federal Election Campaign Act of 1971 (the "Act") or the Commission's regulations promulgated thereunder and dismiss this complaint as soon as possible.

**A. Introduction**

Harvey and Bob Weinstein are two of the three Executive Producers of the movie *Fahrenheit 9/11*, a documentary written, produced and directed by Academy Award winning filmmaker Michael Moore. Fellowship is the production company established by the Weinsteins and is a limited liability company that has elected to be treated as a partnership in accordance with tax laws. *Fahrenheit 9/11* opened in 868 theatres across the country in June 2004, considered a wide release for a documentary, and grossed \$21.8 million in its first three days of release, becoming the first documentary ever to debut as the top weekend film.<sup>1</sup> As of October 3, 2004, the film had grossed nearly \$120 million in the United States.<sup>2</sup>

<sup>1</sup> *Fahrenheit 9/11 Breaks Records*, [www.cnn.com](http://www.cnn.com) (June 27, 2004).

<sup>2</sup> *Business Data for Fahrenheit 9/11*, [www.imdb.com](http://www.imdb.com) (2004)

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According to the official website, [www.fahrenheit911.com](http://www.fahrenheit911.com), the film is an “examination of the Bush administration’s actions in the wake of the tragic events of 9/11.” In fact, that examination covers a multitude of topics as it traces the tragic events of 9/11 through to the Iraqi War, including, among others, a Saudi connection to 9/11, the 9/11 probes, the Department of Justice’s role, the case against Saddam, the role of oil and the Hallibuton “scandal”, airport and coastal security, armed forces recruitment, the plight of wounded soldiers as well as their families, and the President’s role, as leader of the nation and commander in chief. However, importantly, the movie does not examine, nor discuss, the 2004 election.

**B. Discussion**

- 1. This complaint must be dismissed because it is invalid under the Commission’s rules, in failing to provide any information or content describing how the movie violates the law.**

The complaint is insufficient as a matter of law and must be dismissed due to its procedural defects. Pursuant to the Commission’s rules, a complaint must contain a clear and concise recitation of facts which describe a violation of a statute or regulation over which the Commission has jurisdiction and must be accompanied by any documentation available to complainant supporting such facts. See 11 C.F.R. §111.4(d)(3)-(4). A complaint must meet these minimum standards of content and specificity in order to be considered by the Commission, and, more importantly, in order to give respondents an opportunity to understand and answer charges that have been leveled against them. The complaint herein fails, in all respects, to come close to the minimum required.

The present complaint is nothing more than a conclusory statement – the film violates the law – accompanied by “Xeroxed” copies of sections from the Commission’s regulations. No facts are presented, no description is presented, no explanation or analysis is included, and no documents are attached. Simply put, there is no information whatsoever – let alone evidence – that has been included with this filing. This complaint is so devoid of information, it fails to rise even to the level of a “fishing expedition” and, instead is actually more akin to an “opinion” – albeit without merit – of one individual, who may or may not have actually even viewed the movie.

The complaint alleges in totality that Fahrenheit 9/11 “constitutes ‘a communication expressly advocating the defeat of a clearly identified candidate’, namely George W. Bush”. See Complaint at ¶3. There is no information as to how, where, when, why, or what possibly led the complainant to come to this conclusion. The complainant fails to allege that he has ever seen the film, so the use of the term “information and belief” must be taken at face value and viewed with some skepticism. Even accepting that, perhaps, the complainant has seen the movie, there is no information as to what scenes, which video, or what audio run afoul of the law.

Given that respondents strongly assert that the movie does not contain express advocacy, the enforcement process cannot be reduced to a guessing game. Some

description as to what part of the film is the offending portion has to be included, so that respondents have an adequate opportunity to answer and defend. To the contrary, this complaint is utterly deficient and unsubstantiated, completely open-ended, and deprives respondents of any meaningful opportunity to rebut allegations of violations, because there is nothing there. For this reason, we respectfully request that it be dismissed forthwith on procedural grounds.

**2. This complaint must be dismissed because it is invalid under the Commission's rules, in failing to provide any information or content describing how these respondents possibly violated the law.**

In addition, should the Commission determine that this complaint somehow meets the threshold necessary for further consideration, it is similarly not possible to guess as to how the respondents on whose behalf this response is being submitted are implicated or could otherwise be considered to have violated any provision of the Act. No allegation has been made with respect to them, and they are not mentioned in any context in the complaint itself apart from (1) the caption entitled "Respondents" and (2) a vague conclusory statement indicating that "each of the Respondents . . . are fully/partially responsible for the release of the movie "Fahrenheit 9/11".

Obviously, the Weinsteins, as Executive Producers, had a prominent role with respect to this movie, but importantly, none of their actions could be said to have violated the Act. The vagueness of the complaint and absence of any description makes it impossible to discern what provision, as individuals, they are actually alleged to have violated. However, they have made no "contributions" or "expenditures" within the meaning of the Act in connection with the movie; they exceeded no limits, nor used any prohibited funds, nor violated any reporting provisions or otherwise contravened any other conceivable provision. Therefore, they are not appropriate respondents or parties to this matter, and the complaint should be dismissed immediately as it pertains to them.

Fellowship, too, had a prominent role with respect to the movies, but again, none of its actions could be said to have violated the Act. Fellowship is a limited liability corporation that has elected to be treated as a partnership for tax purposes. The vagueness of the complaint and absence of any description makes it impossible to discern what provision, as a partnership, Fellowship is actually alleged to have violated. However, the partnership has made no "contributions" or "expenditures" within the meaning of the Act in connection with the movie; it exceeded no limits, nor used any prohibited funds nor violated any reporting provisions or otherwise contravened any other conceivable provision. Therefore, the complaint should be dismissed immediately as it pertains to Fellowship.

However, should the Commission decline to dismiss this complaint for the procedural reasons stated, we have set forth below why the film does not violate any provision of the Act or the Commission's regulations.

**3. This complaint must be dismissed because the movie does not contain express advocacy.**

Respondents did not produce this film for the purpose of influencing any elections. Instead, and as is well-known publicly, respondents are in the business of producing and distributing movies. These movies are produced and distributed commercially, meaning for the purpose of making a profit for respondents. Fahrenheit 9/11 grossed nearly \$120 million, through the beginning of October, 2004, a tremendously successful profit for a documentary, from any examination of the movie industry.<sup>3</sup>

Fahrenheit 9/11 does not contain express advocacy and is not an independent expenditure. An independent expenditure is an expenditure that contains words of express advocacy and is coordinated with a candidate, a candidate's committee, a party committee, or an agent thereof. 11 C.F.R. §100.16. First, the film does not contain express advocacy. Complainant never explains where or how express advocacy is contained in the film or provides any specific language the meets this requirements. Accordingly, respondents assert that there is none.

Second, the film was not coordinated with any candidate, candidate's committee, party committee or agent thereof. Such a suggestion is nonsensical, given the commercial purpose of the film. To the best that we are able to determine, respondents are not aware of anyone having communications or discussions with any candidate, candidate or party committee, or their agents regarding the content, production, distribution, timing or other facet of the film. Moreover, under the Commission's coordination standard at 11 C.F.R. §109.21, a candidate, candidate or party committee or agent thereof, would have had to meet one of the conduct tests of (1) request or suggestion, (2) material involvement, or (3) substantial discussion, none of which have been alleged, and the very idea of which is ludicrous, given the ordinary course of business in which a commercial film of this nature is produced and distributed.<sup>4</sup>

Accordingly, the Commission should dismiss this complaint, because there is nothing in the content of this film that gives rise to a violation of any statute or regulation in the Commission's jurisdiction, especially given that there is no express advocacy in the movie. However, in the absence of coordination, even if the Commission were to find that the film contained express advocacy, the respondents herein could legally make unlimited independent expenditures. Given the nature and content of this particular film, such a finding would be absurd, but would not be indicative of any illegality, as explained below.

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<sup>3</sup> See footnote 2 above.

<sup>4</sup> This is to distinguish individuals and entities in the business of making movies, from political or non-profit entities which are not ordinarily in this business and do not have a profit-making motive See, e.g., FEC Advisory Opinion ("AO") 2004-30.

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**4. Even should the Commission determine that the movie contains express advocacy, this complaint must be dismissed because the movie is subject to the media exemption.**

Fahrenheit 9/11 is exempt from the Act under the media exemption. Even if the Commission were to find that the film contains express advocacy or somehow constitutes an independent expenditure, it is exempt activity. The Act and the Commission's regulations exempt from the definition of contribution or expenditure and, hence, from coverage of the Act, any cost of carrying a commentary or editorial. 2 U.S.C. §431(9)(B)(i); 11 C.F.R. §100.73, §100.132. In fact, the Commission has explicitly stated that a "documentary" qualifies for this exemption from the Act's coverage: "The Commission interprets 'news story commentary or editorial' to include documentaries and educational programming . . .". See Electioneering Communications, Final Rules, 67 Fed. Reg. 65190, 65197 (October 23, 2002).

In applying this exemption, the Commission has consistently examined two factors: (1) whether the media entity is owned or controlled by a political party, political committee, or candidate, and (2) whether the entity is acting in a legitimate media function in conducting the specific activity in question. See, e.g., AOs 2004-7, 2003-34, 2000-13, 1998-17, 1996-48, 1996-41, and 1996-16. In this case, respondents are two individuals and a partnership, none of whom is owned or controlled by any party, political committee or candidate.<sup>5</sup> All of the respondents in this matter are in the business of producing or distributing movies, including documentaries. This is, in fact, their core business and legitimate function.

The Commission has made the media exemption available to numerous public media companies, including companies such as MTV (a music network), AO 2004-7, and Showtime (a movie network), AO 2003-34, that are involved in disseminating information. In both of these cases, the Commission concluded that the companies involved were press entities engaging in a legitimate press function and that the contemplated broadcast was exempt under the media exemption as a "commentary". See, e.g., AO 2003-34 at p.3. To the extent that a Federal candidate or officeholder was depicted or discussed – including depictions or discussions that constituted express advocacy – the Commission further concluded that there will be no contribution, expenditure, or electioneering communication under the "press exemptions". Id. at p.2-3.

Thus, in many of the past applications of the media exemption, including the MTV AO, the Commission has approved coverage of political campaigns. Here, the movie covers government – rather than political – activities, unarguably a legitimate topic for documentary examination.<sup>6</sup> If the MTV and Showtime proposals qualify as

<sup>5</sup> The same assertion can, of course, be made for Michael Moore and the other respondents as well

<sup>6</sup> If there is any unresolved question as to whether this film qualifies as a documentary, see "*Passion*", "*Fahrenheit*" Hit Snags During Awards Season, [www.washingtonpost.com](http://www.washingtonpost.com) (November 9, 2004)(Fahrenheit 9/11 will not be eligible for a Golden Globe award, because it is a documentary, and the Golden Globes do not have a documentary category).

commentary, then certainly Fahrenheit 9/11 presents an even stronger case. Moreover, if complainant is arguing that merely because a documentary presents a particular political slant or bent, it would no longer be entitled to claim exemption as a commentary, such an argument is completely baseless. Newspaper editorials – as one example – are exempt as commentaries, despite regular politically slanted points of view. Accordingly, just as when newspaper or magazine publishers are acting in their media function by producing and disseminating their newspaper or magazine, the movie producers here are acting in their media function by producing and disseminating this documentary. This is the normal, legitimate conduct of documentary films, and the media exemption applies.

Thus, the Commission should dismiss this complaint, because Fahrenheit 9/11 is a documentary produced in the ordinary course of business by respondent filmmakers, and as such is exempt from the coverage of the Act.<sup>7</sup>

**5. Should the Commission determine that the movie is not subject to the media exemption, this complaint must be dismissed because the movie is exempt commercial profit-making activity.**

Fahrenheit 9/11 is exempt commercial activity carried out in the ordinary course of business. The film has a clear and unmistakable commercial purpose, and has, in fact, grossed nearly \$120 million, as of October 3, 2004, according to media reports. As long as the underlying purpose is commercial, the Commission recognizes the ability of for-profit companies to engage in business activities that have a political component to them.<sup>8</sup> As stated above, respondents are in the business of making movies, and both Harvey and Bob Weinstein are well-known publicly for making movies.<sup>9</sup> Their movies have been widely viewed and commercially successful. Michael Moore has made numerous documentaries.<sup>10</sup>

Such business activity can easily be distinguished from other dissimilar activities where non-profit or political groups that have no legitimate media function, are not in the business of make movies or documentaries, and actually do have a political agenda, produce and disseminate a political film expressly for the purpose of influencing an election. See, e.g., AO 2004-30 at p.8 (“Citizens United does not regularly produce documentaries . . . Citizens United has produced only two documentaries since its founding . . .”). The Commission went on to point out a key distinction between groups

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<sup>7</sup> This includes exemption from any reporting requirements under the electioneering communication provisions. 11 C.F.R. §100.29(c)(2).

<sup>8</sup> In some cases, the Commission has permitted engaging in express advocacy for profit-making motives. See, e.g., AO 1994-30 (The Commission permitted a for-profit business to produce and sell t-shirts containing express advocacy, because it was entrepreneurial profit-generating activity.)

<sup>9</sup> Harvey Weinstein is credited as the producer of 153 movies and Bob is credited as the producer of 150 movies at [www.imdb.com](http://www.imdb.com).

<sup>10</sup> Michael Moore is credited with writing, producing or directing approximately one dozen other documentaries at [www.imdb.com](http://www.imdb.com)

like Citizens United and the respondents here: the former has to pay to have its "documentary" aired, while the latter get paid and earn profits from the showings.

Thus, the respondents herein are as far and factually distinguishable from Citizens United as possible. These respondents are engaged in commercial and entrepreneurial activity in order to make a profit. They have a proven track record of making profitable movies, including other documentaries. Unlike the group in AO 2004-30, the scope of the Act was never intended to cover respondents' activities herein, and as such is clearly outside the coverage of the Act.

Accordingly, the Commission should dismiss this complaint because Fahrenheit 9/11 was produced and distributed in the ordinary course of business by respondent commercial filmmakers, and, as such, is not subject to the coverage of the Act.

**C. Conclusion**

As discussed above, the complaint in this matter contains serious procedural defects that render it invalid under the Commission's administrative requirements for the filing of an enforcement action. However, should the Commission determine that this complaint is not procedurally defective, it is clear that the documentary Fahrenheit 9/11 is not subject to regulation by the Commission, given the fact that (1) it was produced and disseminated in the ordinary course of business, (2) it contains no express advocacy, and (3) it is subject to the media exemption.<sup>11</sup>

For these reasons, we respectfully request that the Commission determine that there is no reason to believe that any of the respondents have violated any provision of the Act or the Commission's regulations promulgated thereunder and dismiss this complaint as soon as possible.

Respectfully submitted,



Eric Kleinfeld  
Lyn Utrecht

Counsel for Respondents

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<sup>11</sup> Please note that, on behalf of these respondents, we have not included the constitutional arguments as to why this complaint must be dismissed, including, but not limited to, respondent's First Amendment rights, but we reserve the right to do so, should the Commission determine to proceed with an investigation of this matter.